Supreme Court, U.S.
FILED
OCT 23 1997
CLERK

No. 97-339

In The
Supreme Court of the United States
October Term, 1997

MICHIGAN MUTUAL INSURANCE COMPANY,
a Michigan corporation, as subrogee of
Center Manufacturing, Inc.,
Petitioner,

v.

OSRAM SYLVANIA, INC., a Delaware corporation,
formally known as GTE PRODUCTS CORPORATION,
a Delaware Corporation,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the District Court properly applied the standards for summary judgment under Fed. R. Civ. P. 56 when it granted respondent Osram Sylvania's motion for summary judgment, concluding that there were no genuine issues of material fact and that the economic loss doctrine under Michigan law applied to bar tort claims.

STATEMENT UNDER RULE 29.6

The respondent is Osram Sylvania, Inc., which is a wholly-owned subsidiary of Siemens Corporation. Siemens Corporation is a wholly-owned subsidiary of Siemens AG. Siemens AG has issued shares to the public. The following are subsidiaries of Siemens AG that have issued shares to the public: Duewag, AG, Krefeld, Germany; Siemens Madrid, Spain; Siemens Pakistan; Siemens India; and Teleco CAVI, SpA, Roseto Degli Abruzzi, Italy.

While Osram Sylvania, Inc. is the only defendant in this action, GTE Products Corporation is the corporate entity which manufactured the metal halide lamp that petitioner claims caused the fire at issue in this case, and which was still in existence at the time the fire occurred. GTE Products Corporation was sold to Osram Acquisition Corporation on January 29, 1993. Osram Acquisition Corporation was merged into GTE Products Corporation, and that entity was subsequently renamed Osram Sylvania, Inc. GTE Products Corporation's former parent company retains some financial interest in the outcome of this case. Accordingly, Osram Sylvania, Inc. discloses the following information concerning GTE Products Corporation:

GTE Products Corporation is a former wholly-owned subsidiary of GTE Products of Connecticut Corporation. GTE Products of Connecticut Corporation is a wholly-owned subsidiary of GTE Corporation. GTE Corporation has issued shares to the public. The following are subsidiaries of GTE Corporation that may have issued shares to the public:

a. GTE California Incorporated
b. The Micronesian Telecommunications Corporation
c. VenWorld Telecom, C.A.
d. Anglo-Canadian Telephone Company
e. BC TELECOM Inc.
f. Pachena Industries Ltd.
g. Pacific Place Communications Ltd.
h. ISM Information Systems Management (B.C.) Corporation
i. Quebec-Telephone
j. GTE Directories (B) SDN.BHD
k. Jacksonville Cellular Telephone Corp.
l. Jacksonville Cellular Communications, Inc.
m. Wilmington Cellular Telephone Corp.
n. Wilmington Cellular Communication, Inc.
o. Burlington Cellular, Inc.
p. AG Communication Systems Corporation
q. Compañia Anónima Nacional Teléfonos de Venezuela (CANTV)
r. 2770695 Canada Inc.
s. Prism Systems Inc.
t. Chesapeake Directory Sales Company
u. GTE Directories Lanka (PVT) LTD.
v. Radiowealth, Inc.
w. Contel of California, Inc.
x. Contel Cellular Inc.
y. Florence Cellular Telephone Company, Inc.
z. DELCOM, INC.
aa. Sovinet
ab. EDN (d.b.a. Sovintel)
ac. MTX Italia

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Respondent, Osram Sylvania, Inc. ("Respondent" or "Sylvania") submits this brief in opposition to the Petition for Writ of Certiorari ("petition") which seeks the review of a decision of the United States Court of Appeals for the Sixth Circuit. (Petition App. 1-10).

STATEMENT OF THE CASE

A. Procedural History

This case arises out of a fire at Center Manufacturing, Inc.'s ("Center") automobile component facility on July 9, 1991. The fire was caused by the failure of a metal halide lamp manufactured by a predecessor of Sylvania. Petitioner Michigan Mutual Insurance Company ("Petitioner" or "Michigan Mutual") insured the Center facility and paid Center in excess of $2.4 million for loss and damage to the facility, loss of earnings and business interruption. (Petition App. 41) As subrogee of Center, Michigan Mutual brought this products liability action against Sylvania, asserting both tort and Uniform Commercial Code ("UCC") claims and alleging that Sylvania is liable for Michigan Mutual's payments to Center arising out of the fire. (Petition App. 42).

The District Court granted Sylvania's Motion for Summary Judgment, dismissing Michigan Mutual's claims on April 4, 1995. The court found that Michigan Mutual's UCC claims were time barred and that the economic loss doctrine, as articulated by the Michigan Supreme Court in *Neibarger v. Universal Cooperatives, Inc.*, 486 N.W.2d 612 (1992), and the Sixth Circuit Court of Appeals in *Detroit Edison Co. v. NABCO, Inc.*, 35 F.3d 236 (6th Cir. 1994), further barred its tort claims. (Petition App. 42-43). The Court of Appeals for the Sixth Circuit affirmed the Order of the District Court,

finding that the District Court properly applied the economic loss doctrine to the facts of this case. (Petition App. 2). Petitioner's petition for Rehearing En Banc was denied. (Petition App. 11).

B. Relevant Facts

Respondent Sylvania manufactures residential, commercial and industrial lighting products, including the 400 watt Universal Metalarc ("M400 U") metal halide high intensity discharge lamp at issue here. The metal halide lamp was produced solely for commercial and industrial uses. Sylvania marketed and sold its lighting products to and through electrical suppliers and distributorships but not directly to end-users. (Petition App. 27). The lamp at issue was manufactured by a predecessor company, GTE Products Corporation, in January 1984 and was accompanied by a lamp sleeve containing operating instructions and warnings as to risks involved in its use, specifically:

> Lamp arc tube operates under pressure and at high temperatures and may shatter during operations. For continuous duty application it is recommended that <u>all</u> metalarc lamps be group revamped on or about rated life and be cycled (turned off) at least once per week to <u>reduce the risk of non-passive failure</u> . . .

(emphasis added)(Petition App. 39-Metalarc Lamp Warnings, hereinafter, "pre-1985 warnings"). The lamps were purchased for commercial use throughout the Center facility and were installed without the benefit of encasing, glass or otherwise. (Petition at 3).

Sylvania established a Metalarc Containment Team ("Metalarc Team") in 1985, due to increasing awareness that metal halide lamps were allowed to burn continuously beyond their rated life and were not always operated in suitably enclosed fixtures. (Petition App. 26, ¶3). The Metalarc Team developed new technology capable of containing non-passive failures and revised the warnings and operating instructions for the Metalarc products. (hereinafter referred to as the "1985 warnings").[1] Because respondent did not sell directly to end-users, the revised warnings and instructions were initially circulated to fixture manufacturers and distributorships and ultimately, through a coordination of efforts between respondent and the fixture manufacturers and distributorships, to end-users. (Petition App. 29).[2]

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[1] The revised warnings and instructions for the metal halide lamps generally informed users that the lamps should be operated in suitably enclosed fixtures and should not be allowed to burn past their rated life. However, if lamps are not operated in enclosed fixtures and allowed to burn past their rated life, the possibility exits that the lamps may fail, whereby "the arc tube, operating at a pressure of approximately 50 psi, bursts and shatters the outer lamp jacket or outer glass encasement. When such a non-passive lamp failure occurred, the hot quartz particles (as high as 1832° F, 1000°C) and the outer jacket glass particles could be discharged against the fixture's enclosure or into the environment if the fixture was open." (Petition App. 26, ¶3).

[2] While Petitioner maintains that Center "did its best" in response to the revised warnings issued in 1985 by no longer purchasing metal halide bulbs manufactured by Respondent and removing the 100 or so lamps in Center's facility, nearly 5 years after receiving the 1985 revised warnings, Center had not removed all of the halide lamps manufactured by Osram. (Petition at 5, n. 1).

Petitioner commenced this action in July 1993, in the United States District Court for the Western District of Michigan, based on diversity of citizenship, seeking damages which resulted from a July 9, 1991 fire at Center's automobile component facility. The fire was allegedly caused by the shattering of one of Center's M400 U Metalarc lamps manufactured in 1984. Petitioner claimed that hot quartz particles that landed on a pallet of cardboard boxes ignited the fire which resulted in extensive damage to Center's facility. (Petition at 4). Petitioner brought this action seeking to recover the $2.4 million it paid Center.

The District Court granted Sylvania's motion for summary judgment and dismissed Michigan Mutual's claim. Since Michigan Mutual conceded that its warranty claims, which were governed by the UCC, were barred by the four year statute of limitations, only the negligence claims were before the court. (Petition App. 42). The Court agreed with Sylvania that the economic loss doctrine as articulated by the Michigan Supreme Court in *Neibarger, supra,* limited Michigan Mutual's remedies for the tort claims to those under the UCC, which in this case, were unavailable because of the statute of limitations. The *Neibarger* court held, "where a plaintiff seeks to recover for economic loss caused by a defective product purchased for commercial purposes, the exclusive remedy is provided by the UCC, including its statute of limitations." 486 N.W.2d at 618.

The District Court reviewed this case in light of the two-step test enunciated in *Neibarger* for application of the economic loss doctrine to property besides the defective product, namely that the damage was within the contemplation of the parties at the time of purchase and that there was an opportunity to negotiate the terms of the purchase, and concluded that each step was satisfied. The Court found that because Center contracted with numerous electrical supply

vendors, it could reasonably have negotiated the terms of its purchase, notwithstanding the absence of direct contact with the manufacturer, and further that fires caused by electrical products were not beyond the contemplation of commercial entities. (Petition App. 43-45).

The Sixth Circuit affirmed. The court likened the facts of this case to those of *Detroit Edison, supra*,[3] noting "[w]here the product is purchased for use in a commercial setting and both parties are business entities, it is more likely that the consequences of the product's failure are within the

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[3] There is no limitation in the economic loss doctrine as articulated in either *Neibarger, supra*, or *Detroit Edison, supra*, that the opportunity to negotiate necessarily must precede the sale (albeit both the District Court and the Court of Appeals properly found that there was such a pre-sale opportunity to negotiate here), so long as "the occurrence of such damage could have been the subject of negotiations between the parties." *Neibarger, supra*, 439 N.W.2d at 620. *See also, Detroit Edison, supra*, 35 F.3d at 241. As noted, Center had 5 years to initiate negotiations after the 1985 warnings and before the fire occurred. Moreover, Petitioner's argument that it had no one to negotiate with is carefully limited to the period "prior to [Center's] purchase of Respondent's lamp"(Petition at 17), since it concedes, as it must, that it was contacted by Respondent by 1986 and was provided additional warnings and information. *See,* Petition at 5, n.1, and App. 26-34. At that juncture and for at lease two (2) years thereafter, Center had, but ignored, the full panoply of UCC remedies available to it, rendering Petitioner's arguments of injustice in the application of the economic loss doctrine bereft of any solid footing.

contemplation of the parties." *Id.*[4] Michigan Mutual's petition for rehearing en banc was denied.

ARGUMENT

A. Summary of Reasons for Denying the Writ

The Sixth Circuit's affirmance of the District Court's grant of summary judgment was based on an entirely routine and correct application of the law regarding Fed. R. Civ. P. 56, as articulated by this Court in its 1986 trilogy decisions in , *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 586 (1986). This Court has already spoken extensively on the Rule 56 issue raised by Michigan Mutual in its petition, and further, the holdings of the 1986 trilogy have consistently been applied throughout the circuits. Given that the Sixth Circuit's decision was in complete harmony with precedents from this Court and those of other circuits, and the absence of conflict within the Sixth Circuit, Michigan Mutual's claimed error by the Sixth Circuit is not an appropriate basis for review by this Court.

The Sixth Circuit properly determined that the economic loss doctrine applied to bar recovery of Michigan Mutual's tort claims and limited Center's recovery to remedies under the UCC. Because the facts of this case fit squarely

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[4] *Detroit Edison Co, supra*, involved a claim by Detroit Edison against a pipe manufacturer after a section of the pipe, which carried steam at both high temperature and pressure, burst causing extensive damage to Edison's facility. The court, noting the sophistication of the parties and the use of the product, limited Edison's recovery to those available under the economic loss doctrine.

within the Michigan economic loss doctrine, Michigan Mutual's attempt to argue that the Sixth Circuit improperly drew inferences in favor of Sylvania is misplaced.

Michigan Mutual has failed to meet its burden of demonstrating "compelling reasons" for this Court to review the decision of the Sixth Circuit. Sup. Ct. R. 10. Michigan Mutual has not established that the Sixth Circuit's holding has broader implications, but in fact misconstrues that court's holding. Michigan Mutual has further failed to demonstrate any true conflict between the Sixth Circuit's decision and precedent from other circuits (which it does not attempt) or from this Court, nor has Michigan Mutual established that there is an important federal question here which should be settled by this Court.

In sum, Michigan Mutual has not shown that the Sixth Circuit's decision involves recurring issues of importance, conflicts with precedent from this Court or from other courts of appeal, or implicates the Court's power to settle important federal questions. Accordingly, Michigan Mutual's Petition for a Writ of Certiorari should be denied.

B. No Conflict Exists Between the Sixth Circuit's Decision and Precedent From this Court and Other Courts of Appeal

1. The Sixth Circuit Properly Applied Michigan's Economic Loss Doctrine in Holding that Michigan Mutual's Tort Claims were Barred

The Sixth Circuit had valid grounds for adopting the self-evident proposition that Center was a commercial customer buying products in a commercial transaction, which mandated

application of the economic loss doctrine. According to Michigan Mutual, the Sixth Circuit contravened long standing precedent of this Court by drawing inferences from the facts in favor of Sylvania, the moving party. Petitioner maintains that Center acted as a consumer when it purchased these halide industrial lamps for its manufacturing facility. Michigan Mutual's strained argument, however, is fatally flawed and was properly rejected by the Sixth Circuit. While Fed. R. Civ. P. 56 requires courts to resolve inferences from the facts in favor of the non-moving party, this Court has specifically restricted the resolution of such inferences in favor of the non-moving party, to those which are reasonable and "justifiable." *Anderson, supra,* 477 U.S. at 255.

Petitioner provides no basis to support its contention that because Center acted as a consumer, the economic loss doctrine does not bar its tort claims. The economic loss doctrine in Michigan "hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts." *Neibarger, supra,* 486 N.W.2d at 615. Application of the economic loss doctrine requires commercial enterprises to look exclusively to the UCC to recover for direct and consequential damage to other commercial property. Obviously, Center was not an "individual consumer," nor was this a sale for anything other than "commercial purposes."[5]

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[5] Indeed, Michigan law unequivocally treats this transaction as commercial rather than one involving "consumer goods" which are defined in the Michigan UCC as those "used or bought for use primarily for personal, family or household

(continued...)

Michigan Mutual maintains that there is a genuine issue of fact as to whether the necessary elements for application of the economic loss doctrine exists in this case. In *Detroit Edison*, the Sixth Circuit restated the rule from *Neibarger* regarding application of the economic loss doctrine to property other than the product, noting specifically that the focus is "on the parties involved and the nature of the product's use." 35 F.3d at 242. Here, Center was a commercial entity using metal halide lamps in a commercial setting, and it sustained economic losses to its business (damage to its facility and contents, and loss of earnings and expenses) as a result of the fire caused by the failure of the lamp. As a commercial user of industrial lamps, suffering economic losses as a result of failure of the lamp, the application of the economic loss doctrine to Michigan Mutual's tort claims was proper and consistent with holdings of the Supreme Court of Michigan and the federal decisions interpreting Michigan law. Petitioner's suggestion that Center is more like a consumer because "Center was no expert on metal halide lamps" (Petition at 15) has no relevant bearing on this case because Center's status as a commercial entity is not affected by its expertise in the use of a product sold in a commercial transaction. Thus, the inferences of fact which petitioner claims were improperly drawn in Sylvania's favor, were not dispositive elements in the application of the economic loss doctrine.

For example, in *Bailey Farms, Inc. v. Nor-Am Chemical Co.*, 27 F.3d 188, 192 (6th Cir. 1994), the Sixth Circuit applied Michigan's economic loss doctrine and held that the

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[5](...continued)
purposes." M.C.L.A. §440.9109. Clearly, Petitioner's efforts to construe Center as a consumer fall far short of the tests for consumers defined in the Michigan UCC and articulated in *Neibarger*.

destruction of a watermelon crop by weed fumigant which resulted in lost profits was a "commercial loss." This was found to be a commercial transaction notwithstanding the fact that the farmer had never before used the soil fumigant product at issue. Likewise in *Snyder v. Boston Whaler, Inc,* 892 F. Supp. 955 (W.D. Mich. 1994), where the plaintiff purchased a charter fishing boat for business and personal use which sank, the District Court held that the plaintiff's tort claims were barred because "economic interests were central" to the transaction and the case involved purely economic loss. Additionally, in *Theuerkauf v. United Vaccines*, 821 F. Supp. 1238, 123 (W.D. Mich. 1993), the court applied the economic loss doctrine to the plaintiff, a mink rancher, where the plaintiff purchased a vaccine for use on his stock which resulted in the death of plaintiff's mink stock. In *Theuerkauf*, there was no suggestion that the rancher had expertise in use of the vaccine or in veterinary medicine. *See also, Hartford Fire Ins. Co. v. Hüls America, Inc.*, 893 F. Supp. 465, *reconsideration denied*, 921 F. Supp. 278 (E.D. Pa. 1995), where the court applied the economic loss doctrine to a nursing home (hardly an "expert" in roofs) which sued the architects and the roofing manufacturer after the roof collapsed. The court held that the economic loss doctrine precluded recovery in tort for damages, when the loss was purely economic.

Petitioner's insistence on defining Center as a "consumer" in an attempt to create a genuine triable issue is specious and has previously been rebuffed by this Court. In *Anderson, supra*, this Court stated, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." 477 U.S. at 247 (emphasis added) . Because the Sixth Circuit's affirmance of the District Court's grant of summary judgment was proper and a routine application of Michigan's

economic loss doctrine, that decision is therefore not appropriate for review by this Court.

2. The Sixth Circuit's Straightforward Application of the Economic Loss Doctrine Mandated Summary Judgment

Michigan Mutual misconstrues the standard for application of the economic loss doctrine and maintains that application of the doctrine to other property requires that (1) the parties were required, at the time of purchase, to contemplate the fire and resulting damage from the failure of the lamp and (2) Center should have had an opportunity to negotiate with Sylvania or its predecessor, GTE, at the time of the lamp's purchase, in order to allocate the risk of such fire. (Petition at 15). Michigan Mutual completely misses the point. The Sixth Circuit's restatement in *Detroit Edison, supra,* of the *Neibarger* rule, noted specifically that the focus for application of the economic loss doctrine is "on the parties involved and the nature of the product's use." 35 F.3d at 242.

The Sixth Circuit quite properly rejected Petitioner's attempt to create an issue of fact through its use of an affidavit from its expert, Dr. Burton Z. Davidson, which "nit picked" the pre-1985 warnings as inadequate, without establishing that anyone from Center ever reviewed or relied on the information contained therein. Instead, the court arrived at common sense conclusion that "while the lamp was not integral to Central's manufacturing process . . . the inherent fire hazard associated with a 400-watt halide lamp is no less within the contemplation of the parties than is the inherent danger posed by a section of reheat pipe [the product which failed in *Detroit Edison*]." (Petition App. 5). As such, these findings are wholly consistent with the teachings of this Court that "[i]f the evidence is merely

colorable, . . . or is not sufficiently probative, . . . summary judgment may be granted." *Anderson, supra,* 477 U.S. at 249-250 (citations omitted).

Further, the absence of an opportunity to negotiate the allocation of the risk does not bar application of the economic loss doctrine. Although the *Neibarger* court did not articulate this as a basis for application of the rule, even if it had, no requirement exists that there be actual negotiations. Actual negotiation presupposes privity between the parties, which is not necessary in Michigan for the application of the economic loss doctrine. *See, Neibarger*, 486 N.W.2d at 614. (Petition App. 5). Since "Petitioner is not alleging that the Court of Appeals misapplied or misinterpreted the economic loss doctrine" (Petition at 10, n. 3), its attempt to argue that a different framework for application of doctrine should have been used is ill-conceived as a basis for this Court's review.

3. The Sixth Circuit's Holding is Consistent with Precedent From This Court

Michigan Mutual also attempts to create a conflict by suggesting that the Sixth Circuit ignored summary judgment precedent. (Petition at 18). Yet the Sixth Circuit's decision was nothing more than a proper application of long-standing, established summary judgment standards. As such, it is not an appropriate decision for review.

The Sixth Circuit correctly followed the decisions from this Court holding summary judgment appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Celotex, supra,* 477 U.S. 317; *see also Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). Moreover, the Sixth Circuit

expressly followed the summary judgment precedent of this Court requiring the evidence of the non-movant to be believed, and all justifiable inferences drawn in its favor. *See*, *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992); *Anderson, supra*, 477 U.S. 242; *Matsushita, supra*, 475 U.S. 574, 588; *Adickes v. S.H. Kress & Co.*,398 U.S. 144 (1970);*U.S. v. Diebold, Inc.*, 369 U.S. 654 (1962). However, notwithstanding that the non-movant is to be believed and inferences resolved in its favor, Fed. R. Civ. P 56 authorizes motions for summary judgment upon proper showing of the lack of a genuine triable issue. *Anderson, supra,* at 248; *Matsushita, supra*, at 587; *Celotex, supra,* at 329. "The mere existence of a scintilla of evidence in support of the non-movant's position will be insufficient; there must be evidence on which the jury could reasonably find for the non-movant." *Anderson, supra, 477* U. S. at 252. Further, "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'." *Matsushita, supra,* 475 U.S. at 587.

In *Anderson, supra,* this Court noted that "the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant." 477 U.S. at 255. Application of the evidentiary standards of the economic loss doctrine bar petitioner's tort claims; and a review of the parties, the loss suffered, and the purpose of the goods, fit squarely within the factors which trigger the application of the economic loss doctrine. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson, supra,* at 248; *See also, Celotex, supra,* 477 U.S. at 322; *Matsushita, supra,* 475 U.S. at 587. Thus, in light of this

Court's holdings in *Anderson*, *Celotex*, and *Matsushita*, the Sixth Circuit properly found that petitioner's argument regarding Center's status as a consumer as opposed to commercial purchaser, was not a genuine issue of material fact sufficient to defeat a properly supported motion for summary judgment.

Based on the straightforward application of the substantive law to the facts herein, the Sixth Circuit properly concluded that because "only one reasonable conclusion [could] be drawn, the factual dispute does not involve a genuine issue requiring trial." *Cook v. Providence Hospital*, 820 F.2d 176, 179 (6th Cir. 1987). Therefore, the Sixth Circuit's decision was merely an application of recognized and settled law of summary judgment precedent. Because this Court generally will not review the application of a properly stated rule of law, the Sixth Circuit's holding on the law of summary judgment cannot serve as a basis for granting certiorari. Sup. Ct. R.10.

C. There is No Important Question of Federal Law Presented Here that Should be Settled by this Court

The Rules of this Court state that a petition for writ of certiorari "will be granted only for compelling reasons." Sup. Ct. R. 10. In general, this Court has instructed that a writ of certiorari will be denied if the case involves circumstances or issues which are not likely to be repeated, *see Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (noting that the Court reviews issues that are "beyond the academic or the episodic"); 13 James W. Moore, ed., *Moore's Federal Practice* ¶810.21 at SC 10-23 (2d ed. 1995) (stating that the Court will not be inclined to review "an issue that is unlikely to recur" or

"results from a unique factual situation"), or if "the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Moreover, certiorari will be granted "only 'in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority'" between the courts of appeals. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (quoting *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923)). Finally, this Court has refrained from resolving conflicts that arise between panels within the same circuit, on the grounds that such conflicts should be resolved by the court of appeals internally. *See, e.g., Taylor v. U.S.*, 493 U.S. 906, 906 (1989); *Davis v. U.S.*, 417 U.S. 333, 340 (1974); *Wisniewski v. U.S.*, 353 U.S. 801, 902 (1957). As has been discussed, petitioner has failed to satisfy these criteria, and has not offered "compelling reasons" for granting a writ of criteria here.

In an attempt to provide an alternative ground for granting certiorari, Michigan Mutual argues that this Court should review the Sixth Circuit's decision so that it may provide guidance regarding the resolution of summary judgment motions in federal courts, specifically, the proper construction of inferences from facts on a motion for summary judgment. (Petition at 24). Michigan Mutual claims that the Sixth Circuit's decision sanctioned the District Court's erroneous grant of summary judgment where genuine issues of material fact remained. Michigan Mutual argues that the Sixth Circuit improperly construed inferences of fact in favor of Sylvania, the moving party, in contravention of this Court's summary judgment precedent. Michigan Mutual further maintains that this Court must revisit the standards articulated in 1986, to avert perceived looming anarchy and chaos by

District Courts and among the circuits respecting the proper resolution of motions for summary judgment. (*Id.*).

The case law, however, does not support Michigan Mutual's contentions. The overwhelming majority of circuits have adopted holdings in motions for summary judgment consistent with that of the Sixth Circuit, which is consistent with the precedents from this Court. In *H.L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005, 1012 (2nd Cir. 1989), the Second Circuit held that "only reasonable inferences can be drawn from the evidence in favor of the nonmoving party."(emphasis in original). Also, in *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1339 (3rd Cir. 1987), which involved a motion for summary judgment where a claim of conspiracy was made, the Third Circuit held that *Matsushita* directs us "'to consider whether the inference of conspiracy is reasonable.'" Finally, in *Essex v. United Parcel Service, Inc.*, 111 F.3d 1304,1308 (7th Cir. 1997), the Seventh Circuit, affirming a grant of summary judgment by the District Court and citing both *Celotex* and *Anderson*, noted, "[t]o withstand summary judgment, the nonmovant must demonstrate that the record as a whole permits a rational fact-finder to rule in his favor." (citation omitted).

To defeat a properly supported motion for summary judgement, this Court expressly requires the existence of a genuine issue of material fact. *Anderson, supra*, 477 U.S. at 247; *Celotex, supra*, 477 U.S. at 329; *Matsushita, supra*, 475 U.S. at 587. Michigan Mutual reliance on *Diebold* and *Anderson* to support its contention that the Sixth Circuit drew improper inferences in favor of Sylvania, is misplaced. In both *Diebold* and *Anderson*, this Court sanctioned the drawing of reasonable and justifiable inferences in favor of the non-moving party. Petitioner, however, glosses over the Court's requirement that the inferences be reasonable and justified.

See, Eastman Kodak, supra, 504 U.S. at 468 n.14 (citing numerous decision of this Court and Courts of Appeals which reiterate the notion that only reasonable inferences can be drawn from the evidence in favor of the nonmoving party). Michigan Mutual would have this Court make the requested inferences that Center acted as a consumer when it purchased the Metalarc lamp and that it had no basis upon which to contemplate that a high wattage lamp, operated at high pressure and at high temperature, could cause a fire under any circumstances. Such inferences are not only unreasonable, but are also unjustified given the undisputed evidence. Therefore, the Sixth Circuit's decision to reject the notion that Center was anything other than a commercial entity and was not akin to an "individual consumer" was proper and consistent with both *Diebold* and *Anderson*, as well as with the long line of authorities addressing this issue.

As the Sixth Circuit's holding was consistent with precedent from this Court, there has been no confusion or inconsistency in the application of the inference rule in the resolution of respondent's motion for summary judgment. "[T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 249. (citations omitted). Evidence "not significantly probative" or which is "merely colorable" will not defeat a motion for summary judgment. *Id.* Since the Sixth Circuit tracked and upheld this standard in its affirmance of the summary judgment granted to Sylvania by the District Court, this decision is not appropriate for review by this Court and the petition for writ of certiorari should be denied.

CONCLUSION

For the forgoing reasons, the petition of the Michigan Mutual Insurance Company for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 21, 1997